

JORGE MARQUEZ
Claimant

COLLECTIA LTD.
Respondent

ESIS OVERLAND PARK WC
Insurance Carrier

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed.

Claimant claims he suffered injury to his low back on or about May 17, 2011, while lifting trash bins onto a flatbed truck for respondent. Claimant testified that on May 17, 2011, he had driven from Ulysses, Kansas to Santana, Kansas to collect three or four metal trash bins that needed to be brought back to the shop. In the process of completing this task, claimant injured his low back. He testified that the truck he was using didn't have a crane to lift the bins into the truck, so he had to push them on to a Tommy Lift by hand to get the bins onto the truck. It was during this process that he developed pain in his back. Claimant testified that these bins are heavy because they are metal. He moved three or four that day.¹ Claimant testified that the act of having to push the bins using his body caused his low back to hurt. He testified that he always works alone, so there were no witnesses to his accident.²

A few days after the accident, claimant's back continued to bother him and he sought medical attention. Claimant called respondent and told Simon Chavez that he was having pain and was going to see a doctor. He didn't report that the pain was from an accident at work.³

On June 3, 2011, claimant saw Dr. Jerome Greene, a chiropractor in Garden City. Dr. Greene adjusted the claimant and took him off work. The initial chiropractic note indicates that claimant's low back as "reactivated" after a three plus year period. It started to get sore two weeks ago.⁴ There was no mention of a work-related accident. Claimant took the off work slip to respondent. He continued with chiropractic treatment and continued to provide respondent with off work slips as they were provided to him.⁵ The June 3, 2011, Authorization for Absence from Dr. Greene indicates claimant is off work due to lower back pain. The off work slip contains no mention of the cause of the pain.

Claimant testified that despite the chiropractic treatment, his back pain got worse to the point he went to the emergency room at Bob Wilson Memorial Hospital in Ulysses. He was given injections for the pain and remained in the hospital for a few days. The initial admissions medical record from the hospital indicates that claimant sneezed in the morning, and the pain became worse. Claimant also noted that the chiropractic visits seemed to make his back worse. Again, there was no mention of a work-related connection. The medical history indicates a one week period of low back pain with

¹ P.H. Trans. at 7.

² *Id.* at 6.

³ *Id.* at 18.

⁴ *Id.*, Cl. Ex. 1 at 4 (Dr. Greene's June 3, 2011 chiropractic note).

⁵ *Id.* at 10.

radiation down the left leg. On June 11, 2011, claimant met with Dr. Douglas Johnson who ordered a CT scan, which revealed that claimant had a bad disc.

On June 13, 2011, claimant was sent to the Kansas Spine Hospital, in Wichita, Kansas, for treatment. The medical records from that date indicate a three week history of low back pain radiating down the posterior left leg with numbness and tingling in his left foot. The past medical history is listed as “negative”. No work-related injury information is contained in the medical report.

On June 14, 2011, claimant spoke with his supervisor, Brian Debaun and reported to him that he had injured his back moving the dumpsters. Claimant testified that he assumed the office secretary had been giving Mr. Debaun his off work slips and respondent was aware his back problems were work-related. This was the first time claimant had spoken with Mr. Debaun about the accident himself. From the time of the accident to the time claimant spoke with Mr. Debaun, no accident report had been filled out.⁶ Claimant had back surgery on June 15, 2011, performed by Dr. Matthew Henry. The last day that the claimant was able to work was June 2, 2011.

On June 13, 2011⁷, claimant underwent a left L5-S1 hemilaminotomy, medial facetectomy and foraminotomy with left L5-S1 discectomy.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁸

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁹

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

⁶ *Id.* at 12.

⁷ The Operative Report contains a date of June 13, 2011. However, the admission date also contains a date of June 13, 2011 and was not dictated until June 14, 2011. Additionally, claimant testified that his actual surgery occurred on June 15, 2011.

⁸ K.S.A. 2011 Session Laws of Kansas, 44-501 and K.S.A. 44-508(h).

⁹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.¹⁰

The two phrases “arising out of” and “in the course of,” as used in K.S.A. 44-501, et seq.,

... have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase “in the course of” employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer’s service. The phrase “out of” the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”¹¹

K.S.A. 2011 Session Laws of Kansas, 44-508(d)(g) states:

(d) “Accident” means an undesigned, sudden and unexpected traumatic event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.¹²

Claimant alleges an accidental injury which arose out of and in the course of his employment with respondent on May 17, 2011. However, claimant failed to advise respondent of this alleged accident until June 14, 2011, when claimant was in the hospital awaiting surgery on his low back. Additionally, the contemporaneous medical records from Dr. Greene, the chiropractor, from Bob Wilson Memorial Hospital and from the Kansas Spine Hospital contain no information regarding an alleged work-related accident. The parties dispute, under the recently enacted version of K.S.A. 44-508(d), whether claimant has proven that the work-related accident was the “prevailing factor” in causing the injury here. But, before the prevailing factor issue is considered, claimant must first prove that

¹⁰ K.S.A. 44-501(a).

¹¹ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

¹² K.S.A. 2011 Session Laws of Kansas, 44-508(d)(g).

he suffered an accidental injury which arose out of and in the course of his employment. Here, claimant sought medical treatment with several health care providers and failed for several weeks to provide a history of a work-related accident. While claimant testifies that he gave an accurate history to every health care provider, he cannot explain how every health care provider managed to omit the history of the accident while claimant was working with the dumpsters. This Board Member finds that claimant has failed to prove that he suffered personal injury by accident while working for respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The award of benefits by the ALJ is therefore, reversed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated August 15, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October 2011.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Thomas R. Fields, Attorney for Claimant
C. Albert Herdoiza, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

¹³ K.S.A. 44-534a.